Supreme Court, U.S.
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No. 00-967

In the Supreme Court of the United States

STEVEN D.C. BIGELOW, *Petitioner,*

v.

DEPARTMENT OF DEFENSE, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY BRIEF

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Argument

1. We have not argued that this case must be granted plenary review because of a split in the circuits, but rather, because the decision below (a) conflicts with *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), (b) gravely misconstrues the Defense Department's regulation (without the benefit of a deference-entitled statement of agency position), and (c) affects an enormous number of public- and private-sector personnel. The government has made no effort to respond on the first and third of these, and its response on the second has no merit, as the regulation shows and as Judge Tatel explained below.

2. On the merits, the government maintains (at 7-8) that "[n]othing in the DoD regulations establishes

th[e] unlikely rule" that a supervisor who learns of derogatory information "may not investigate the accuracy of the information before reporting it." Far from being "unlikely," that is precisely what the regulations provide, in 32 C.F.R. § 154.9(a), Pet. 16 n.9 ("[n]o other DoD Component shall conduct personnel security investigations unless specifically authorized by the Deputy Under Secretary of Defense for Policy").[1]

3. The fundamental flaw in the government's position in this Court—as it has been throughout this litigation—is that it believes that whether Col Noyes had a right to read petitioner's security file should be determined solely by Noyes's own assertion that he had such a right and that he followed proper procedure in doing so. But in taking that position, and in obtaining summary judgment, the government offered nothing but Noyes's self-serving statements. Worse yet, when petitioner sought discovery that would have permitted him (and the district court) to determine what the Defense Department's actual practices are regarding access by supervisors to security files of those who work for them, and whether there were written procedures and/or guidelines that dealt with this subject, his request was denied. This made it impossible for him to establish,

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[1] *See also id.* §§ 154.55(b)(1), Pet. 17 n.10 (derogatory information to be referred to commander or security officer), 154.60(c)(3), Pet. App. 79a (derogatory information relating to trustworthiness, reliability or loyalty to be forwarded by supervisor to Defense Security Service). *See* Pet. App. 10a (Tatel, J., dissenting). Col Noyes "was investigating allegations of misconduct." Pet. App. 90a. DOD requires that allegations of criminal activity be referred to the appropriate military criminal investigative organization. 32 C.F.R. § 154.9(c)(4).

either as a matter of practice or as a matter of law within DOD, that supervisors were not entitled to access to their subordinates' security files. Unless review is granted, the individual who is accused of having obtained Privacy Act information in violation of the statute will have the first, last, and only word on the mixed question of law and fact of whether that individual had a need to know and hence had proper access to sensitive security files of others.[2] If the person who receives Privacy Act materials contrary to the statute is, as a practical matter, the final and exclusive arbiter of the legality of that release, both DOD's high-sounding assurances of careful protection of such materials, *see* Pet. 4-5, and the judicial review for which Congress provided, will be illusory.

4. Judge Tatel's dissent notwithstanding, the government apparently considers it extravagant to suggest that there is something fundamentally wrong in permitting Privacy Act need-to-know cases to proceed without any documented input from the records custodian. Viewing the statutory scheme as a whole, however, allowing such a case to proceed without requiring that the official (if any) who made the need-to-know determination be identified and, if necessary, subjected to discovery is indefensible because it would basically immunize a wide swath of disclosures from meaningful

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[2] According to the leading military law review article, "[t]he *releasing* official, normally the records custodian, should determine whether it is a valid agency function and whether the information is actually needed to perform the function." John F. Joyce, *The Privacy Act: A Sword and a Shield But Sometimes Neither*, 99 MIL. L. REV. 113, 147 (1983) (emphasis added).

scrutiny. Thus, Congress expressly exempted disclosures to agency personnel with a need to know from the "accurate accounting" requirement found in 5 U.S.C. § 552a(c)(1). If, *in addition*, such disclosures can be made without even the minimal accountability entailed in permitting a plaintiff to take discovery from the releasing official (especially if the government does not submit anything from that official), rather than having to take the self-serving word of the leakee, need-to-know defenses will effectively be self-validating and beyond the reach of the federal courts. The Privacy Act was intended to ensure the privacy of those about whom the government maintains records, not the privacy of those who maintain those records.

5. The government accurately notes (at 9) that the Court of Appeals' majority's deference to the United States Attorney's Office's interpretation of DOD's Personnel Security Program regulation was an alternative holding. Rather than straightforwardly addressing Judge Tatel's demonstration that deference is not warranted under *Bowen*, the government observes that petitioner's position "turns largely on the signature blocks that appear on various briefs in this case," and "ignores facts such as Noyes's record statement ([Pet. App.] 90a) that he followed 'procedure' in reviewing petitioner's file," and "DoD's consideration of its own regulations involves only the application of settled law to particular facts." These points are without merit:

a. There is not a shred of evidence in the record as to DOD's alleged "consideration of its own regulations." *Even now*, there is no indication that the interpretation to which the majority below deferred in its alternative holding has been embraced by any policy-level official of DOD. Signature blocks are direct evi-

dence on this score; so is the text of the government's submissions, and what remains glaringly absent is so much as a representation that some official to whom deference is owed has expressed, ratified or even simply agrees with the interpretation to which the Court of Appeals deferred in its alternative holding. Col Noyes is not such an official.

b. Col Noyes's unexamined claim that he followed "procedure" in examining petitioner's security file is no answer to whether the interpretation for which the government's attorneys have argued is entitled to deference under *Auer v. Robbins*, 519 U.S. 452 (1997). Moreover, the government cannot have it both ways: it cannot be permitted to rely on a claim of adherence to procedure and yet deny all discovery. On this record, the claim of adherence to procedure also rings hollow in light of the fact that the government (1) does not dispute our observation (Pet. 5) that the Joint Staff Security Office's retention of the record to which Col Noyes obtained access itself violated DOD regulations, (2) admits (at 8 n.2) that he violated the regulations in referring the matter to the Air Force, and (3) has repeatedly insisted that it would make no difference if he had obtained the file by going "unsupervised into the security office through a window in the dead of night . . . in violation of a hundred written procedures." *See* Pet. 20 & n.11 (citing government pleadings in district court and court of appeals).

Conclusion

For the foregoing reasons and those previously stated, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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